

Truong (Migration) [2023] AATA 1217 (13 February 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Dung Minh Truong
VISA APPLICANT:	Ms Thi Truc Nguyen
REPRESENTATIVE:	Mr Tam Nguyen (MARN: 0743595)
CASE NUMBER:	2016204
DIBP REFERENCE(S):	BCC2019/5091350
MEMBER:	Edward Howard
DATE:	13 February 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211(2) of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 13 February 2023 at 10:51am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 October 2020 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the Migration Act 1958 (the Act).
3. The visa applicant applied for the visa on 11 October 2019 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211.
5. The review applicant appeared before the Tribunal on 16 December 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The review applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES AND LAW

7. There is a two-stage process for offshore Partner visas. A visa applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the first, temporary stage.
8. Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.15A(3) matters may relate to circumstances after the time of application. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the review applicant were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.¹
9. The issue in the present case is whether at the time of the visa application and the time of this decision, the parties satisfy the criteria under cl.309.211 and cl.309.221.

¹*Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it ‘tends to logically show the existence or non-existence of’ the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

Whether the parties are in a spouse or de facto relationship

10. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the review applicant who is an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

12. Are the parties validly married?

13. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

14. The parties have lived in separate countries since their marriage in April 2019. The review applicant has visited his wife in Vietnam on one occasion since the time of their marriage, staying for one month. His intentions of further visits were impacted by the Covid-19 pandemic.
15. The evidence of the review applicant is that he has been retired from work since about 2014. He lives on Centrelink benefits of approximately \$938.00 per fortnight.
16. The visa applicant lives with her parents in Vietnam where they operate a farm. The review applicant sends money to his wife to assist with her expenses and living. The review applicant has provided receipts of funds transferred to his wife in Vietnam commencing in May 2019. Additionally, the review applicant has spent money on his travel to Vietnam and the cost of travelling with his wife in Vietnam. He has also sent many gift packages to his wife commencing in May 2018, shortly after they first started their relationship online.
17. The Tribunal views these matters as evidence of considerable commitment, given that the review applicant has been on government benefits during the entirety of their relationship.
18. The Tribunal finds on the evidence that while the parties do not have joint ownership of any real estate or other major assets, however they do pool their financial resources to a limited extent by virtue of the financial support the review applicant has provided to his wife over an extended period, to assist with her living expenses. The Tribunal accepts that due to the fact that the parties live in different countries the financial aspects of the relationship are limited and the parties have no liabilities nor owe legal obligations to each other. The Tribunal places some weight on the financial information provided by the parties.

Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

19. The parties have lived in different countries since their marriage in 2019. During the course of their marriage, the review applicant has visited Vietnam and lived with his wife and her family.
20. The evidence of the parties is that the visa applicant lives with her family on their farm in Vietnam. The parties have provided evidence of their time together in Vietnam at the home of the visa applicant's family.
21. The Tribunal is satisfied that during the periods in which the review applicant was in Vietnam, the parties' household and living arrangements were consistent with that of a married couple in a genuine relationship. The parties have no responsibility for the care and support of children. The Tribunal weighs consideration of the household aspects of the relationship in favour of the visa applicant.

Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

22. The parties have provided evidence from friends and acquaintances, supporting their claim of being a married couple in a genuine relationship. The statements demonstrate the clear recognition by others who have recognised and considered the parties as a genuine married couple.
23. The parties also provided photographic evidence of themselves in the company of family and friends in Vietnam.
24. The Tribunal is satisfied on the evidence that the parties represent themselves to other people as being married to each other, that they hold the favourable opinion of friends and family members about the nature of the relationship and that they regularly plan and undertake joint social activities. The Tribunal weighs the social aspects of the relationship in favour of the applicant.

Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

25. The parties first met via online social media in April 2018. Their relationship developed and they met in person for the first time on 26 March 2019, when the review applicant travelled to Vietnam. The visa applicant and her family picked up the review applicant from the airport.
26. The review applicant stayed with the visa applicant and her parents for a month during which time they were married on 13 April 2019.
27. The visa applicant has remained in Vietnam from that time. The visa applicant is keen to obtain employment if she is able to travel to Australia. The parties remain in contact on a regular basis by social media and phone.
28. The review applicant has spent considerable time with the visa applicant's parents and family and has a good relationship with them.

29. The evidence of the review applicant is that the parties have much in common including interests in cooking and gardening, especially growing vegetables and flowers.
30. The parties have shown a significant level of commitment to each other, commencing their relationship in 2018 and being married since April 2019.
31. The parties have provided the Tribunal with evidence of recognition and support from family members and friends as to the genuineness of the relationship, the social acceptance of each of them with the other and their commitment as a couple.
32. From the evidence provided, the Tribunal finds that the parties are in a genuine and continuing relationship, show a strong commitment to each other, provide significant emotional support to each other and clearly see the relationship as long-term. The Tribunal weighs the nature of the commitment in favour of the applicant.

Overall Conclusions

33. Having carefully considered all the evidence and for the reasons above, the Tribunal is satisfied that at the time of application, the parties had a mutual commitment to a shared life as a married couple to the exclusion of all others; that the relationship between them was genuine and continuing; and that they lived together or not separately and apart on a permanent basis as a married couple since 13 April 2019. The Tribunal is therefore satisfied the requirements of section 5F of the Act were met the time of the visa application.
34. The Tribunal is further satisfied that at the time of this decision the parties continue to have a mutual commitment to a shared life to the exclusion of all others and that the relationship between them has been and remains genuine and continuing. The Tribunal is also satisfied that they have lived together or not separately and apart on a permanent basis. The Tribunal is therefore satisfied the requirements of section 5F(2)(a)-(d) of the Act are met at the time of this decision.
35. The Tribunal is therefore satisfied that the parties' relationship fulfilled the criteria contained in clause 309.211(2) of the regulations at the time the visa application was made and at the time of this decision.
36. Pursuant to clause 309.221(1), in order to be eligible for the grant of a subclass 309 (UF) visa, the visa applicant must also continue to meet the requirements of clause 309.211(2) at the time of this decision. Having regard to the evidence before the Tribunal, the Tribunal is satisfied that the visa applicant continues to meet the requirements of clause 309.211(2), hence satisfying the criteria in clause 309.221.
37. Therefore, the Tribunal finds that the visa applicant meets the requirements of clauses 309.211(2) and 309.221.
38. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a subclass 309 visa.

DECISION

39. The Tribunal remits the application for a Partner (Temporary) (Class UF) visa, with the direction that the visa applicant meets the following criteria for a subclass 309 (partner) visa:
- cl 309.211(2) of Schedule 2 to the Regulations
 - cl 309.221 of Schedule 2 to the Regulations

Edward Howard
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).